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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1927.

Nos. 136 and 137

THE NASHVILLE, CHATTANOOGA & ST. LOUIS RAILWAY,

PLAINTIFF IN ERROR AND APPELLANT,

vs.

R. D. WHITE, AS ADMINISTRATOR OF W. S. WHITE; ELIZABETH WHITE, BY HER NEXT FRIEND, R. D. WHITE; LIZZIE J. WHITE, AND R. D. WHITE,

DEFENDANTS IN ERROR AND APPELLEES.

IN ERROR TO AND ON APPEAL FROM THE SUPREME COURT OF TENNESSEE.

BRIEF ON BEHALF OF THE NASHVILLE, CHATTANOOGA & ST. LOUIS RAILWAY.

FITZGERALD HALL,
Counsel for Plaintiff in Error and Appellant.

FITZHUGH & FITZHUGH,
FRANK ELKINS,
WALTON WHITWELL,
Of Counsel.

November 5, 1927.

(23,428, 23,429)

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1928.

THE NASHVILLE, CHATTANOOGA & ST. LOUIS RAILWAY,

PLAINTIFF IN ERROR AND APPELLANT,

Versus

R. D. WHITE, AS ADMINISTRATOR, ET AL

Defendants in Error and Appellees.

Numbers 135 and 169.

IN ERROR TO AND ON APPEAL FROM THE SUPREME COURT OF TENNESSEE.

BRIEF ON BEHALF OF THE NASHVILLE, CHATTANOOGA & ST. LOUIS RAILWAY.

May It Please the Honorable Court:

On the night of December 21, 1925, W. B. White drove his Ford car on to a grade crossing in the city limits (R., 169) of Memphis, Tennessee, without stopping (R., 97, 313, 316) and a collision occurred with one of the Railway's regular passenger trains. W. B. White, the driver, was killed and the three other occupants of the car were injured. (R., 93, 99, 106.)

Four separate suits were brought against the Railway. (R., 46, 51, 55, 60.) These were consolidated and tried together in the trial court (R., 70, 79), in the Supreme Court of Tennessee (R., 34), and here (R., 416).

In each case each plaintiff relied, among other averments of negligence, upon an old ordinance of the city of Memphis (R., 177, 232) passed January 17, 1880 (R., 232, 235) requiring all railroads in Memphis at every grade crossing to maintain at all times, day and night, a flagman "waving a flag in the day time, and a red lighted lamp at night, to give warning to all of the approaching train . . ."

The validity of this ordinance was specifically challenged by special pleas and by appropriate motions on the ground that in view of better and more economical protection resulting from modern inventions it imposed a direct and useless burden on interstate commerce, was so arbitrary as to lack due process of law, and required the useless waste of the funds of an interstate carrier by railroad. (R., 65-66, 357.)

Verdicts were rendered for the four respective plaintiffs. (R., 387.) The consolidated cases were affirmed on March 31, 1928, by the Supreme Court of Tennessee except that a remittitur was entered in the case of the driver of the car. (R., 43.)

The consolidated cases are here both on writ of error and appeal.* (R., 19, 422.)

The Supreme Court of Tennessee** held, among other things, that said ordinance was valid (R., 37) and that its violation was the proximate cause of the collision giving rise to these four cases. (R., 40.) This constitutional question is the only one presented to this honorable Court.

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*There being some doubt as to the effect of the Act of January 31st, 1928, as amended by the Act of April 26, 1928, it was thought advisable, out of an abundance of precaution, to perfect both a writ of error and appeal. The record in error was filed May 11th, 1928, before the present rules of this honorable Court adopted June 5th, 1928, were promulgated.

**The opinion of the Supreme Court of Tennessee in these cases has not yet been printed in either the Tennessee Reports or the Southwestern Reporter, but is set out in full in the record, pages 34-42.

JURISDICTION.

1.

Final judgments were entered on March 31, 1928. (R., 43.) A writ of error was allowed May 1, 1928. (R., 2, 18-19.) That case was docketed in this court May 11, 1928. An appeal was perfected May 21, 1928. (R., 418, 422.) That case was docketed in this court June 1, 1928. Exactly the same questions are involved in the two cases and by stipulation they are here on the same record. (R., 416, 419.)

The municipal ordinance under attack, enacted January 17, 1880 (Section 670 of Hughey's Digest of Memphis, Tennessee) is as follows:

> "All railroads, whose trains of cars are drawn by steam engines, within the limits of this city, shall provide flagmen for each street such trains may cross; and these flagmen shall be kept constantly on duty at each street when such train crosses, and until the engine has crossed such street, waving a flag in daytime, and a red lighted lamp at night, to give warning to all of the approaching train; and the engineer on each of such trains shall keep the bell constantly ringing while his train is passing through the city, and shall not permit the whistle to be blown while passing through the city; and any and all persons or railroad companies offending against this ordinance shall, upon conviction before the Mayor, be fined not less than $1 nor more than $50 for each and every offense; and a failure to comply therewith, at each and every street crossing, shall be deemed a distinct and separate offense." (R., 177, 232-233.)

Its validity was challenged in all the Tennessee courts and here on the following grounds. Inventive genius has provided through a double audible and visible signal operated by electricity a substitute for the human flagman, which is better, more efficient and more economical. To require, as this ancient obsolete ordinance on its face is held to do, the continuation of the "*human*" flagman when a better and cheaper "*mechanical*" flagman is available—

(a) Violates the due process clause of the Fourteenth Amendment in that it is palpably arbitrary and unreasonable.

(b) Violates the Transportation Act of 1920 which enjoins upon railroad managements efficient and economical operation. See paragraph 3 of Section 15a of the Interstate Commerce Act.

(c) Violates the Commerce Clause (paragraph 3 of section 8 of Article I) of the Constitution of the United States in that it requires a useless waste of funds derived from interstate commerce—thus directly burdening the same—and prevents the best and most effective protection for such commerce.

2.

The judgment sought to be reviewed was a final one by the Supreme Court of Tennessee, which is the court of last resort in that state. The question is as to the constitutionality of a municipal ordinance directly challenged by the proper procedure as violating the federal constitution. The jurisdiction of this honorable Court is claimed under Section 237a of the Judicial Code, as amended by the Act of February 13, 1925. The following cases sustain the right of review by writ of error or appeal under the Act of January 31, 1928, as amended by the Act of April 26, 1928.

Sultan Railway & Timber Company v. *The Department of Labor and Industries of State of Washington*, 48 Supreme Court, 505;
John P. King Mfg. Co. v. *City Council of Augusta*, 48 Supreme Court, 489;
Miller v. *Schoene*, 48 Supreme Court, 246;
Saltonstall v. *Saltonstall*, 48 Supreme Court, 225;
Kansas City Southern Ry. v. *Road Improvement District No. 3*, 266 U. S., 379, 386.

3.

A municipal ordinance is a state statute within the meaning of those words as used in said Section 237 of the Judicial Code as amended.

John P. King Mfg. Co. v. *City Council of Augusta*, 48 Supreme Court, 489;
Zucht v. *King*, 260 U. S., 174, 176.

4.

The Supreme Court of Tennessee expressly overruled the Railway's claim of unconstitutionality and by its opinion and judgment actually enforced against the Railway the municipal ordinance under attack. (R., 37, 40, 43.) The validity of this ordinance is therefore subject to challenge here.

Fiske v. *Kansas*, 274 U. S., 380, 385.

5.

The constitutional question was raised, first, by special pleas (R., 65-67), then by motion at the conclusion of all the testimony (R., 357), then in the motion for a new trial (R., 388-406), then by appropriate assignments of error in the Supreme Court of Tennessee (R., 20-33), and now by proper assignments of error in this Court. (R., 3-18.) This complies in full with the requirements of law as announced in *Mellon* v. *O'Neil*, 48 Supreme Court, 62, and *Whitney* v. *California*, 274 U. S., 357, 360.

6.

To determine whether this ordinance lacked due process of law under the Fourteenth Amendment and was a direct burden upon interstate commerce certain facts were essential to be considered. Most of such testimony was not admitted. (R., 238-241, 261, 272-273, 276-278, 279-280, 288-291.) Where an analysis of the facts is essential to the determination of a question under the federal constitution, their consideration and review by this honorable Court is proper.

First Nat'l Bank of Hartford v. *City of Hartford*, 273 U. S., 548, 552;
Aetna Life Ins. Co. v. *Dunken*, 266 U. S., 389, 394.

7.

As aforesaid, being in doubt as to the effect of the Act of January 31, 1928, as amended by the Act of April 26, 1928, both methods of review were followed in line with the procedure required by Rule 46 of this honorable Court.

Even if both appeal and writ of error should be inappropriate in the case at bar, still it is respectfully submitted that a writ of certiorari is justified by the record and warranted by paragraph (c) of Section 237 of the Judicial Code, as amended by the Act of February 13, 1925.

Roche v. *McDonald*, 48 Supreme Court, 142.

STATEMENT OF THE CASE.

The Pleadings.

Each of the four declarations are alike save for the *ad damnum* provisions. (R., 46-64.) In each the first count was based primarily on three city ordinances, to-wit, a speed ordinance, a parking ordinance and a flagman ordinance. The first two ordinances were abandoned. (R., 178-179, 363-364.) It is averred that the failure to maintain a human flagman was the proximate cause of the collision. (R., 48, 53, 57, 62.) The first were common law counts. (R., 81.)

The second count in each declaration was predicated on the alleged violation of certain Tennessee statutory requirements for the operation of trains. (R., 81.)

In addition to the Railway's plea of the general issue, (R., 64) it set up in its fifth and sixth special pleas (R., 65-66) that modern invention had developed by an electric signal device—a mechanical flagman—a much better, safer and more economical method of crossing protection than that afforded by the human flagman, so that *to obey this ancient ordinance means both less safety and greater cost.* Therefore, it is averred, said ordinance imposes a direct and unnecessary burden on interstate commerce, forbids that efficient and economical operation enjoined by federal law, and is so arbitrary as to deny due process of law.

Plaintiffs did not challenge by demurrer or motion to dismiss the legal efficacy of these special pleas but *joined issue* thereon. (R., 69.)

The Trial.

During the trial the Railway undertook to prove how the "human" flagman and the "mechanical" flagman operated, their respective advantages and disadvantages. The trial judge would permit no comparison between the "human" and "mechanical" flagman and excluded from the record the opinions of experts on this highly technical operating detail. (R., 229-231, 236-240, 259-265, 277-278, 280, 287-289.) Typical

portions of such testimony are set out *in extenso* in the assignment of errors in this Court. (R., 3-18.)

The train which struck the Ford car was engaged in interstate commerce. (R., 355.)

Testimony Admitted.

The city ordinance relied on and enforced against the Railway was passed January 17, 1880. (R., 232, 235.) It requires a "flagman"—nothing is said about "human"—to wave a flag by day and "a red lighted lamp at night . . ." (R., 177.)

The proof shows that *railroads in Memphis and elsewhere* for many years have almost uniformly installed these modern devices instead of having human flagmen. (R., 235, 260, 264, 271, 271-272, 273, 275, 277, 279, 282, 286-289, 345.) Proof not only that the Memphis city authorities acquiesced in such practice but actually encouraged it was excluded. (R., 236, 288-291.)

It is undisputed that this "mechanical" flagman does all that the ordinance requires, to-wit, "waving . . . a red lighted lamp at night . . ." (R., 188, 201, 209, 220, 227.)

Constant progress is being made in the art of railroading. (R., 259-261, 276.) Excellent pictures of this "mechanical" flagman may be found opposite pages 414 and 416 of the record. Its working in connection with the Railway's interlocking plant at the point of the accident is thus described in the record.

> "Q. I will ask you to tell the jury now how this interlocking system out at Poplar Street crossing, and signal system works. Just give them a clear idea of it?
>
> A. This interlocking system out there, and the highway crossing signals—
>
> Q. Interrupting: First, tell us about the interlocking system, and then take up the highway signal?
>
> A. Well, the interlocking itself is composed of what is called an interlocking machine, and each switch signal is connected with a lever to this machine which is operated

by an operator, the power being taken from a storage battery. All switches must assume the position taken by the lever and correspond to it before it can be indicated, and the road lined up. After all the switches and derails are in proper position, the lever in them pulled which operates the signal and that, in turn, allows the passage of the train through the interlocking.

Q. Speak a little more distinctly, Mr. Shubert.

A. Now, the highway crossing signal is controlled through the track; that is, the tracks are bonded together by a bond (fol. 662) wire, copper wire, and the rails are energized by a set of primary batteries. When a train enters within 2,500 feet of the crossing, the trucks of the cars short circuit this current across the rail and that energizes what we call a relay, which in turn, controls this auto-flag, which is both an audible and visible indication to approaching motor cars on the highway. The last operation, after the derail is thrown the lever is pulled upright, the signal to allow the train to proceed over the crossing, as soon as this signal is pulled and the train is in 2,500 feet of the crossing, the bell immediately begins to operate, as well as the flashing of the lights in the auto-flag. Now, that is true of either direction. That is about all there is to the operation.

Q. Now immediately upon the proceed signal being given, which is done by the pulling of a lever, as I understand.

A. Yes.

The Court: Who gets that proceed signal—the engineer?

A. The engineer of the train; yes, sir.

Q. What light does it show, the proceed signal?

A. A green light. Otherwise it is red.

Q. Otherwise it is red?

A. Yes, sir.

Q. Where is the caution signal, if there is one down north of this crossing?

A. Located 2,500 feet north of this home signal. (fol. 663.)

Q. What is that intended for?

A. It is an indication as to what he may expect to find as he approaches the home signal.

Q. If that stands at caution, what is the engineer expected to do?

A. He expects to find a red signal at the home signal.

Q. And that would mean that he must not proceed until what is done?

A. Until the lever is pulled for the board to proceed, or to assume the proceed position.

Q. The light then becomes what?

A. The light starts to flash red.

Q. I mean—

A. The light on the semaphore signal of the home signal is then green.

Q. Turns green. Within what distance can that proceed signal be seen by the engineer, approximately?

A. 1,600 feet.

Q. 1,600 feet. Now, when this proceed signal is given and the engineer comes within 2,500 feet of the crossing, what, if anything, automatically happens?

A. The bell starts to ringing; that is, on the highway crossing signal, or auto-flag, and the lights begin to flash, *being an imitation of a lantern waving back and forth.*

Q. How is that observable to people on the crossing or (fol. 664) approaching on either side?

A. It is impossible to pass it without seeing it. It is an audible as well as visible signal. *It is impossible to pass without observing it—signal lights.* That is, eight in succession; an *imitation of a lantern waving back and forth.*

Q. Now, do the lights go on seconds or minutes apart, or how?

A. Well, they operate about twelve times a second.

Q. All of them?

A. All of them—that is, in sequence, one after another, at the rate of about twelve a second.

Q. Do you mean twelve times—

A. A second.

Q. All of them, twelve flashes a second?

A. Yes.

Q. For each one of them in succession?

A. Yes, sir.

Q. What appearance has that got?

A. *The appearance of a red lantern waving back and forward across the crossings.*

Q. I will ask you the height of that signal post, if you know?

A. *It is 11 foot and eight inches.*" (R., 225-227.)

. . . . . .

"Q. Do those lights flash just on one side or both sides?

A. *On both sides, both approaches to the track.*

Q. Protects both?

A. Yes." (R., 228.)

. . . . . .

"A. These are installed by railroads, due to the fact that they know from past experience, and *I know that they* (fol. 668) *are far superior to crossing watchmen.*

Q. Why?

A. Well, they are on duty all the time, that is, twenty-four hours a day, they have no reason for leaving the crossing, such as a human might. They can indicate to approaching automobiles, long before a crossing watchman could either hear or see an approaching train. Their signal is not confused. That is, a human watchman might get confused between a signal to an approaching automobilist or signal to a train. There is no confusion with

this. It is distinct, and being audible and visible too, it can be heard by a blind man, if it cannot be seen, and railroads recognize that fact." (R., 229-230.)

. . . . . .

"Q. During the entire time that it has been installed there (fol. 681) I will ask you how long, if at all, it has been out of order partially or otherwise?

A. *Approximately 30 minutes, within the last twelve years.*

Q. Thirty minutes in twelve years. Do you know yourself of any better device, means of protecting and safeguarding crossings than this?

Judge Wilson: We object to that, if your Honor please." (R., 238).

Actual experience by the railroad talent of the world demonstrates that this "mechanical" flagman is far superior to the "human" flagman. (R., 229, 260, 261, 264, 274, 277, 282, 286, 288-289, 346-347.)

The "mechanical" flagman is much more economical than the "human" flagman—the difference in the *annual* operating cost of the two kinds of protection in municipal limits alone (excluding all other crossings) on the Railway's lines is over a million dollars a year. (R., 279-282.)

There was no proof to support the ordinance save the ordinance itself.

Testimony Excluded.

Typical portions of the testimony excluded are set out in full in the assignment of errors in this Court. (R., 3-18.) The evolution in crossing protection, the recognition thereof by the municipal authorities of Memphis itself, the informed judgment of the railroad talent of the world was excluded. (R., 236-238, 261, 272-273, 276-280, 288-291.)

The Charge.

The trial judge instructed the jury that this flagman ordinance was valid, that it had been violated by the Railway,

that such violation was negligence as a matter of law, and that their verdict should be for the plaintiffs if they found that such violation was the proximate cause of the collision. (R., 373-374.)

The Verdicts.

These four cases were tried at the same time by the same jury under substantially identical pleadings. The jury in two cases found for the plaintiff on both counts and in two cases for the plaintiff on the first and *for the Railway* on the second counts. (R., 387.)

Opinion of the Supreme Court of Tennessee.

The Supreme Court of Tennessee held that the ordinance was valid, that its violation was the proximate cause of the collision [though it held that the two men on the front seat "were guilty of gross contributory negligence" (R., 41)], that the expert testimony excluded was properly excluded because its admission would have been an invasion of the province of the Court—namely, to determine whether the ordinance was constitutional or unconstitutional. (R., 35.)

SPECIFICATION OF ERRORS.

I.

Section 670* of *Hughey's Digest* of the ordinances of the City of Memphis, passed January 17, 1880, is void because it, as construed by the Tennessee Supreme Court, requires a "human" flagman though the undisputed proof of experts is that the "mechanical" flagman is both more efficacious and more economical. The result is a useless waste of funds earned from interstate commerce to obtain less adequate protection. The ordinance so construed enjoins a direct and unnecessary burden on interstate commerce, is so palpably arbitrary as to deny due process of law and makes impossible that efficient and economical operation required by federal law. (R., 3, 13-17.)

II.

Said city ordinance does not *in terms* require a "human" flagman—it merely requires a flagman to "wave . . . a red lighted lamp at night to give warning to all of the approaching train . . ." The "mechanical" flagman used by the Railway was a legal compliance with the only power the City of Memphis could constitutionally exercise, namely, to require adequate warning of the approach of trains. A municipality may not constitutionally, even in the supposed exercise of its police power, force an interstate common carrier by railroad to take some course other than the safest or to utterly waste its funds. (R., 13-17.)

III.

Testimony that the constituted authorities of Memphis, though informally, now recognize as best the "mechanical" flagman, actually encourage its use, and that the railroad talent

*Counsel for plaintiff below conceded the invalidity of all save the first clause of said ordinance. (R., 233.)

of the world does likewise was both relevant and competent so its exclusion was prejudicial error. The question to be decided by the court was whether the ordinance was constitutional; the question propounded to the witnesses was an entirely different one, to-wit, "What is the best form of crossing protection and why?" To exclude the proof tendered was to recognize as infallible and immutable an ancient legislative declaration, obsolete in point of fact and long ignored in actual practice. (R., 4-12.)

ARGUMENT.

I.

That this ordinance was valid a half century ago—as no doubt it was—is immaterial. *Galveston Electric Company* v. *City of Galveston*, 258 U. S., 388, 400-401. It was adopted under the police power to prevent accidents at grade crossings. Its only requirement is that a flagman shall wave ". . . a red lighted lamp at night . . ." (R., 177.)

This ordinance was passed in 1880 (R., 235). Electrical engineering, as well as railroading, was then in its infancy. A "human" flagman was all then known—a "mechanical" flagman was unknown.

This ordinance directly affects both safety in operation and the expenditure of funds earned in interstate commerce. Its validity therefore is, in the last analysis, for this honorable Court to determine. *Alabama and Vicksburg Ry.* v. *Jackson and Eastern Ry.*, 271 U. S., 244, 250.

The mere fact that it was passed in the exercise of state police power delegated to a municipality is not controlling. Police powers may not be exerted arbitrarily. Intention, howsoever good, does not control. "The actual facts govern." *Sprout* v. *City of South Bend*, 48 Supreme Court, 502, 503.

A state may not, even in the exercise of its police power, directly and seriously burden or unduly discriminate against interstate commerce or act arbitrarily or unreasonably.

Colorado v. *United States*, 271 U. S., 153, 163;
Sanitary District of Chicago v. *U. S.*, 266 U. S., 405, 426;
Missouri v. *Kansas Natural Gas Co.*, 265 U. S., 298, 306;
LaCoste, et al. v. *Louisiana*, 263 U. S., 545, 549;
St. Louis & San Francisco Ry. v. *Public Service Commission*, 254 U. S., 535;
Chicago, Burlington & Quincy R. R. v. *Wisconsin Railroad Commission*, 237 U. S., 220, 226-227.

A state statute or a municipal ordinance may on its face appear perfectly valid but when applied to a given state of facts may become invalid. It is only by a consideration of the facts that the validity of such a statute or ordinance can be determined.

Southern Railway v. *King*, 217 U. S., 524;
Seaboard Air Line v. *Blackwell*, 244 U. S., 310;
City of Acworth v. *Western & Atlantic R. R.*, 159 Ga., 610, 126 S. E., 454, 459.

To determine the federal question here raised a consideration of the facts was essential and therefore proper.

First Nat'l Bank v. *Hartford*, 273 U. S., 548, 552;
Aetna Life Ins. Co. v. *Dunken*, 266 U. S., 389, 394;
Chicago, B. & Q. R. R. v. *Wisconsin*, 237 U. S., 220, 230.

The layman does not understand the technicalities of railroad operation. Inevitably one guesses one way, another a different way. *Hence the views of real experts must control. Southern Pacific* v. *Berkshire*, 254 U. S., 415, 417; *Chesapeake & Ohio* v. *Leitch*, 48 Supreme Court, 336; *Toledo, St. L. & W. R. Co.* v. *Allen*, 48 S. Ct., 215, 217. Yet the trial judge in the case at bar excluded much of the evidence of those in position to know, such testimony being essential to a proper consideration and determination of the constitutional question here involved.

Such a statute as the Georgia "Blow Post" law is not on its face invalid. *Southern Railway* v. *King*, 217 U. S., 524. But when proof of facts show its actual effect it is obviously invalid. *Seaboard Air Line* v. *Blackwell*, 244 U. S., 310. Proof of the facts tendered in the case at bar to support pleas on which issue was joined should have been admitted. *They are as competent here as in said Blackwell case.*

II.

Substantially this identical question was decided favorably to the Railway's contention by the Supreme Court of Georgia in the recent case of *City of Acworth* v. *Western & Atlantic Railroad*, 159 Ga., 610, 126 S. E., 454.

III.

Such cases as *Erie Railroad & Public Utilities Commissioners*, 254 U. S., 394, are irrelevant. There the state in the proper exercise of its police power was remedying a dangerous situation by the *most modern* method of crossing protection—the only point made by the railroad was the enormous cost. In the case at bar the point made by the Railway is that the ordinance as construed by the Tennessee Supreme Court requires the adoption of an *obsolete method of protection* at excessive cost.

IV.

The question here is in very narrow compass. An ordinance to prevent crossing accidents was passed in 1880. The method of protection therein provided was *then* the best known. *Today* that method is entirely obsolete. Electrical inventions have made the "mechanical" flagman far superior to the "human" flagman. (R., 229, 260, 264, 274, 277, 282, 286, 288-289, 346-347.)

Railroads generally, even in Memphis where this old flagman ordinance is still on the books, have resorted to this new, better and more economical method of crossing protection. (R., 235, 260, 264, 271, 271-272, 273, 275, 277, 279, 282, 286-289, 345.)

The Railway offered to show that all the real experts think the "mechanical" flagman far superior to the "human" flagman (R., 229, 260, 264, 274, 277, 282, 286, 288-289, 346-347) and that the City of Memphis, informally to be sure, not only acquiesced but encouraged the use of these electrical devices. (R., 236, 288-291.)

The Railway wanted to put all the facts in the record. The trial judge excluded them on the theory that the question propounded the various witnesses was the question of law he was to decide. (R., 230, 239-240.) Such was not the case. The question of law raised by the Railway was as to the constitutional validity of the flagman ordinance. No witness was asked any such question. They were asked in substance "What is the best form of crossing protection and why?" Their answers—calling for facts alone—obviously were at least competent, even if not controlling, on the question of a technical detail in railroad operation.

There is no proof to support the practice supposedly required by this old ordinance—namely, the use of a "human" flagman. Competent evidence was introduced and offered to show that the "mechanical" flagman provides greater safety at less cost.

The ultimate question then is this—Is an ancient legislative declaration under the police power forever unassailable as long as it is on the statute books? Or again—Is this old flagman ordinance, obsolete in fact and ignored in practice, to be judged by its face alone, or may facts—never dreamed of when it was passed—be put in evidence to demonstrate that obedience thereto requires the waste of funds collected from selling interstate transportation to obtain an out-of-date and comparatively ineffective safety device?

Suppose a municipal ordinance were passed today requiring railroads in the interest of safety to illuminate all grade crossings at night by coal oil lamps. Would anyone seriously urge that the installation of the finest and most modern electric lights would be a violation of that ordinance, or if so, that the ordinance would be valid! Such is the case here.

Railroads are required by law to operate efficiently and economically. Their progress may not be impeded by out-of-date ordinances requiring a form of protection long since discarded as obsolete.

It is respectfully submitted that the Railway had a right to protect the crossing where the collision here involved occurred by the best and most modern device; and that this old ordinance of 1880 cannot be periodically invoked merely to saddle railroads with a charge of negligence for failing to use

obsolete safety devices which the City of Memphis no longer wants. If the legislative branches of municipal governments won't keep pace with the art of railroading, then the courts will unshackle them.

Respectfully submitted,

THE NASHVILLE, CHATTANOOGA & ST. LOUIS RAILWAY,
By FITZGERALD HALL,
Counsel.

FITZHUGH & FITZHUGH,
FRANK SLEMONS,
WALTON WHITWELL,
Of Counsel.

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